Chapter 5

BROWN ACT

I. Division Priority/Policy In Enforcing Brown Act

The Public Integrity Division is responsible for enforcing the Brown Act in Los Angeles County. Our ultimate goal is full compliance by all agencies within our jurisdiction that are subject to the provisions of the Act. In order to obtain full compliance, and restore the citizen's confidence in government, it is imperative that we respond to all complaints and, in cases in which a violation has occurred, seek an appropriate remedy in a timely fashion. An appropriate remedy, as will be discussed below, can range from a letter suggesting procedural changes to a misdemeanor criminal filing. Although a criminal filing may be warranted in some egregious situations, our primary goal is always compliance.

For several reasons, time is of the essence in Brown Act investigations. First, there are statutory time limitations imposed as to some of the available remedies which require prompt decisions and actions by the moving party. Secondly, a failure to act swiftly tends to embolden the offending agency and frustrate the complainant, leaving both with the perception shared by many prior to the inception of PID, that Brown Act violations are not treated seriously. Also, as with any investigation, memories and enthusiasm fade with time.

The Brown Act is contained in Government Code sections 54950 – 54963. Helpful references include: *The Brown Act, Open Meetings for Local Legislative Bodies* (2003) California Attorney General's Office and *Open & Public IV: A Guide to the Ralph M. Brown Act*, 2nd Edition, Revised July 2010, League of California Cities.

II. Review Process

A. Initial evaluation

1. Notice of no violation found

Upon initial receipt of a complaint of a potential Brown Act violation, the first determination should be whether the facts alleged in the complaint, if true, would constitute a violation. If the complainant's statement of facts would not constitute a violation of the Act, a letter shall be written to the complainant including the following:

a) The complainant's recitation of the facts as understood by the reviewing deputy;

b) A brief statement of the applicable Brown Act sections;

c) A brief analysis explaining why the facts, as stated, do not constitute a violation of the law.

2. Request for additional information

If the facts alleged by the complainant are inconclusive or unclear, a letter shall be written to the complainant requesting additional facts or clarification. The complainant shall be notified in the letter of any applicable time limitations and shall be given a specific date by which to respond. They shall be notified that failure to respond in a timely manner will result in the case being closed.

The handling deputy shall follow up to determine whether the complainant responded within the time limit and close the case in the event the complainant failed to respond. In cases where time constraints would make a letter to the complainant impractical, the handling deputy should contact the complainant directly to obtain the required information.

3. Notice of investigation and no violation found

Where the facts as alleged by the complainant would, if true, constitute a Brown Act violation, the handling deputy shall obtain the evidence required to establish the truth of the facts alleged. At the conclusion of the investigation and review of the evidence, if it is the handling deputy's opinion that a violation did not occur, a letter, as discussed above (II.A.1.), shall be sent to the complainant explaining the decision not to pursue a violation.

If, after a review of the evidence, the deputy is of the opinion that a violation occurred, the deputy shall make a recommendation to the Head Deputy as to which remedy is the most appropriate.

B. Document review

The first step in any review of a possible Brown Act violation is the collection and review of the relevant documents. These would include: agendas, minutes and any documents reviewed, discussed or voted on by the agency members. Pursuant to Government Code section 54957.5, agendas and any documents distributed during a meeting of the agency are public records. Many city council meetings are audio or video taped. A review of the relevant tapes should also be done as an initial step.

Documentary evidence, such as agendas, minutes, tapes and/or transcripts are public records that can be obtained directly by the handling deputy. Minutes of closed sessions are not public records but may be subpoenaed to court if a closed session violation is alleged to have occurred (G.C. § 54957.2).

When handling an allegation of an agenda violation, a review of the agenda and the minutes and/or tape recording may be all that is required to make a determination whether a violation occurred.

C. Dialogue with agency

In situations where the agency is represented by counsel who may have advised the agency at the time of the violation, the handling deputy may wish to contact the agency's attorney. Often a dialogue with the agency's attorney can streamline the review process. The attorney can provide the required documents, provide the agency's version of the facts and explain the reasoning behind the agency's actions and any exception to the Brown Act upon which they were relying. All contact with the agency should be in writing and those writings shall be considered to be public documents.

D. Investigation

If additional investigation is required after all relevant documents have been obtained and reviewed, an investigator should be assigned to interview any witnesses. These may include the complainant, members of the audience, agency members or employees of the agency.

If the complaint alleges that an agency is improperly posting the agenda, an investigator should be assigned to physically view the posting location. Photographs should be taken to document an improperly posted agenda.

III. Available Remedies

A. Government Code § 54960.1 – Cure and correct

1. Policy and procedure

As our primary goal is compliance, our initial inquiry should include an evaluation of the effectiveness of attempting voluntary compliance through the "cure and correct" procedures contained in § 54960.1. Section 54960.1 should be our primary remedy and be utilized whenever appropriate.

Section 54960.1 allows for an action by mandamus or injunction to have a judge declare as null and void an action taken by an agency in violation of the Brown Act.

Prior to filing suit, the demanding party must make a demand of the offending agency to cure and correct the violation. The demand must be made within 90 days from the date the action was taken, unless the violation was an agenda violation pursuant to § 54954.2, in which case the demand must be made within 30 days. The agency has 30 days within which to respond to the demand. If no response is made, or if the agency makes written notification of its decision not to cure or correct, the demanding party has 15 days within which to commence a lawsuit or be barred.

Although the "cure and correct" remedy should be our primary tool to enforce compliance, it should only be used where action by the agency is taken and is capable of subsequent correction. Procedural violations not resulting in action are probably better dealt with by a letter bringing the violation to the attention of the agency or in accordance with the provisions of § 54960 (see III.B. below). Examples of situations in which the "cure and correct" remedy pursuant to § 54960.1 would be appropriate include:

a) Decisions made or actions taken by a majority of agency members during an illegal closed session;

b) Actions taken on non-agenda items;

c) Votes taken by secret ballot.

2. Agency notification and demand for cure

If the recommendation by the handling deputy is to "cure and correct," a letter to the agency shall be prepared. The letter should contain the following:

a) A brief description of the complaint received (without revealing the identity of the complainant);

b) A summary of the facts as we have determined them to be and supported by the evidence reviewed;

c) An explanation of why we believe a Brown Act violation has occurred, including reference to specific Government Code citations;

d) A "cure and correct" demand stating specifically what remedial action we are requesting of the agency;

e) The time frame within which the agency must comply or otherwise respond;

f) The consequences of non-compliance.

3. Complainant notification

A blind copy of the letter shall be sent to the complainant.

4. Agency response

The handling deputy shall be responsible for monitoring the actions of the agency in response to the cure and correct letter. We are only interested in full compliance with our demand. It is the policy of this division that we will not negotiate or compromise. If full compliance does not occur, a lawsuit will be filed within the statutory time.

B. Government Code § 54960 – Preventing future violations

1. Policy and procedure

Government Code § 54960 provides for the commencement of an action by mandamus, injunction or declaratory relief for the purpose of determining whether the agency is in violation of the Act, preventing future violations by the agency and/or requiring the agency to tape record future closed sessions. This option is appropriate in situations where no illegal action was taken but there are ongoing procedural violations of the Brown Act. As obtaining relief pursuant to § 54960 requires initiating and litigating a civil lawsuit, this option should only be utilized in situations where the agency refuses to acknowledge the violation or refuses to conform future conduct to the requirements of the Act.

Prior to opting for this remedy, attempts should be made to obtain voluntary compliance. This should be done by way of a letter to the agency and their legal counsel explaining the nature of the complaint, our legal reasons for concluding that a violation has occurred or is occurring, and what steps should be taken by the agency to correct the violation. The letter should notify the agency that this office will continue to monitor future meetings to determine whether the agency complies with the Act. If compliance is not attained, a second letter should be sent notifying the agency of our intent to file a civil lawsuit, followed by the initiation of legal proceedings.

Although we will always be willing to engage in a dialogue with the offending agency or their counsel regarding a difference of opinion on the interpretation of the Brown Act, full compliance is our goal and we will not negotiate a compromise that does not conform to the requirements of the Act.

2. Typical violations

Examples of situations in which Section 54960 would be appropriate include:

a) Agenda preparation and posting violations (54954.1; 54954.2);

b) Imposing conditions on the public to attend meetings (54953.3);

c) Restricting the public's right to testify at meetings (54954.3).

3. Voluntary compliance

If the recommendation by the handling deputy is to proceed by way of preventative relief pursuant to Government Code § 54960, the agency shall be given the option of voluntarily complying with the Act, prior to the initiation of the request for injunctive relief. In order to give the agency the opportunity to voluntarily comply, a letter shall be written containing the following:

a) A brief description of the complaint received (without revealing the identity of the complainant);

b) A summary of the facts as we have determined them to be and supported by the evidence reviewed;

c) An explanation of why we believe a Brown Act violation has occurred, including reference to specific Government Code citations;

d) A demand stating specifically what action the agency must take to conform their behavior to the mandates of the Brown Act;

e) A statement notifying the agency that failure to correct their procedures could subject them to civil action.

4. Complainant notification

A blind copy of the letter shall be sent to the complainant.

5. Agency response

The handling deputy shall be responsible for monitoring the actions of the agency in response to the demand letter. We are only interested in full compliance with our demand. It is the policy of this division that we will not negotiate or compromise. If full compliance does not occur, a lawsuit will be filed within the statutory time. If appropriate, the handling deputy should also consider a demand pursuant to Government Code § 54960 that the agency tape record future closed sessions.

C. Government Code § 54959 - Criminal penalty

1. Policy and procedure

Government Code § 54959 allows for the filing of a misdemeanor against any agency member who attends a meeting where action is taken in violation of the Brown Act, when the member intends to deprive the public of information to which the member knows, or has reason to know, the public is entitled.

The filing of a misdemeanor should only be used as a last resort. A criminal Brown Act violation should only be filed in situations where the agency members clearly acted with the requisite specific intent or where the agency members have continued to criminally violate the Act after written notice from this office. If the recommendation is for a criminal prosecution, a Filing Memorandum shall be prepared pursuant to the Public Integrity Division Operations Manual (section 4(D)).

Although § 54959 subjects only members of the agency to misdemeanor prosecution, under Penal Code § 31, aiders and abettors would also be liable. Non-agency members who conspire with agency members to violate the Brown Act would also be liable for felony prosecution under Penal Code § 182.

Wharton's Rule would probably prohibit filing a conspiracy if the only persons involved in the conspiracy were agency members. "Where the cooperation of two or more persons is necessary to the commission of the substantive crime, and there is no ingredient of an alleged conspiracy that is not present in the substantive crime, then the persons necessarily involved cannot be charged with conspiracy to commit the substantive offense and also with the substantive crime itself .... This is the 'concert of action rule' or Wharton's Rule." (*People v. Keyes* (1930) 103 Cal.App. 624, 646.

IV. Disclosure of Information

If contacted by the media or members of the public regarding the existence or status of a Brown Act complaint, the handling deputy shall provide only the following information:

a) Confirmation that a complaint has been received;

b) The identity of the agency against whom the complaint was made;

c) Whether the matter is open or closed;

d) Whether a letter was sent to the agency;

e) Whether a civil or criminal complaint has been filed.

If a letter has been sent by the handling deputy to the agency regarding any findings or conclusions resulting from the complaint, a copy of that letter is a public record pursuant to the Public Records Act and shall be made available to the media or a member of the public upon request. In cases in which no letter has been sent, neither the specific nature of the complaint nor the underlying facts shall be disclosed to the media or public.

V. Confidentiality of the Complainant

Consistent with the law regarding non-percipient witnesses, and in an effort to encourage vigilance, the identity of the complainant shall not be disclosed to the media, public or the agency. This policy allows those who wish to report perceived violations to do so without compromising their privacy. Any request for disclosure of the identity of the complainant shall be evaluated pursuant to the Legal Policies Manual and applicable statutory authorities.